IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., *Appellees*.

On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

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OPINIONS BELOW.

The opinion of the specially constituted District Court of the United States for the Eastern District of North Carolina, Raleigh Division, in No. 189 Civil, *State of North Carolina* v. *United States*, appears in the Record at pages 549-574; its findings of fact and conclusions of law appear

at pages 546-547; its decree thereon entered appears at page 545; and reported 56 F. Supp. 606.

The order of the Interstate Commerce Commission which gave rise to the proceedings in the District Court appears at pages 507-508 of the record; the report of the Commission upon which said order was made appears in the record at pages 69-96; and is reported 258 I. C. C. 133, entitled, *Alabama Intrastate Fares*.[1]

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47(a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a specially constituted District Court of the United States, made pursuant to the provisions of Title 28, U. S. C., Sections 41(28), 43-48, and Title 49, U. S. C., Section 17(19), in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission (herein called I. C. C.), other than for the payment of money.

The North Carolina rail lines (appellees here), upon whose petition the I. C. C. instituted the proceedings giving rise to the order here involved, duly intervened as parties defendant in the District Court under authority of Title 28, U. S. C., Section 45a (R. 108-109).

The final decree of the District Court was entered on the twentieth day of July, 1944 (R. 545). The petition for appeal was presented and allowed on the eighteenth day of September, 1944 (R. 583). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 596).

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[1] The report and subsequent order of the Interstate Commerce Commission embraced four proceedings; one involving passenger fares within the State of North Carolina here immediately involved, Docket 29036, and three other similar and separate proceedings involving passenger fares within each of the States of Alabama, Docket 28963, Tennessee, Docket 29037, and Kentucky, Docket 29000. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order.

THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15(1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2); 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13(3), (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix A (bound separately) to this brief.

Section 13(4) immediately involved is quoted here:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected, thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

STATEMENT OF THE CASE.

This appeal brings up for review the decree (R. 545) of the statutory three-judge District Court wherein the order (R. 507) of the Interstate Commerce Commission was upheld. The I. C. C. ordered appellees (North Carolina rail lines) to increase their civilian[2] coach-fare rates within the State of North Carolina from 1.65 cents to 2.2 cents per mile, that is to say, from the basis or level required by the North Carolina Utilities Commission to the interstate level of such fares prescribed by the Interstate Commerce Commission for general application. The order so upheld also required the round-trip fares for civilian travel in coaches over the lines of these appellees in North Carolina to be increased from amounts, with varying limits, to the uniform basis of 1.98 cents per mile, good for three months, that is, to be the same as the interstate level. The round-trip rate of 1.98 cents per mile is less than the one-way rate of 2.2 cents per mile. It is unnecessary to discuss the lower round-trip rate.

It was following the failure and refusal of the North Carolina Utilities Commission in its order of July 8, 1943, No. 2789 (R. 128-140), to authorize the increase in passenger fares just stated that rail carriers operating in North Carolina, except the Norfolk and Western Railway Company, filed their petition with the I. C. C. (R. 121). It thereupon instituted an investigation of these intrastate fares under the provisions of Title 49, U. S. C., Section 13 (3) (4). The Norfolk and Western Railway Company was not a petitioner before the North Carolina Utilities Commission. It was not a party to the petition to the I. C. C. That was because it already had in effect coach fares of 2.2 cents per mile applicable intrastate on its two

[2] Confined to "civilian" because the lower charges paid by United States Government for troop movements and the 1.25 cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

lines in North Carolina, one to Winston-Salem and the other to Durham, aggregating approximately 100 miles of railroad within the state. The I. C. C. instituted the investigation by its order dated October 13, 1943, wherein the rail lines, appellees here, were made respondents (R. 141). After a full hearing, it entered the order against respondent rail lines directing that their intrastate coach fares in North Carolina be raised uniformly to the level of the prevailing interstate fares (R. 507). The report and order of the I. C. C. must be read together: *Georgia Comm. v. United States*, 283 U. S. 765, 771.

Upon making a general investigation of interstate passenger fares throughout the country, the I. C. C. in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (1936), found reasonable for general application a rate of 2 cents per mile in coaches in lieu of 3.6 cents, and found reasonable 3 cents per mile in sleeping and parlor cars in lieu of 3.6 cents per mile plus 50 per cent of the charge then generally in effect for sleeping or parlor car space occupied.

In *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the I. C. C. authorized the aforesaid 2-cent rate increased to 2.2 cents and 3 cents to 3.3 cents. (The latter is not here involved.) (R. 521.) This authority, with certain increases in freight rates also therein sanctioned, was granted to enable the railroads to maintain adequate transportation service during the national emergency. These increases were limited to the period of the emergency, that is, until six months after termination of the present war (248 I. C. C. 613). The 2.2-cent fares were made effective interstate February 10, 1942. The railroad regulatory bodies of forty-four states sanctioned the 2.2-cent coach fare for intrastate application in their respective states. Four states refused; North Carolina here immediately involved, and Alabama, Tennessee, and Kentucky, whose appeal from a decree of a statutory three-judge District Court of the United States for the Western District of Kentucky, Louisville Division (56 F. Supp. 478), is now before this Court in No. 574, *State of Alabama, et al., Ap-*

pellants, v. *United States, et al., Appellees*, October Term, 1944. Separate thirteenth-section proceedings were had before the I. C. C. as to each state's rates and separate hearings were held, but they were argued together before the I. C. C. and one report (258 I. C. C. 133) and order was issued to cover all four proceedings. (R. 69, 507.)

A chronological history of the background of this case is submitted herewith as Appendix B (bound separately).

SUMMARY OF ARGUMENT.

We take the broad position here that the ultimate findings and conclusions of the Interstate Commerce Commission are grounded upon basic findings of fact which are adequately supported by evidence. The ultimate findings, briefly paraphrasing and omitting references to the other three states, are:

The interstate coach fares are reasonable. The intrastate fare in North Carolina is lower than corresponding fares interstate and generally intrastate. (R. 95.)

The conditions affecting coach transportation of passengers intrastate in North Carolina and interstate to, from, and through North Carolina are substantially similar. The interstate passengers travel in the same trains and generally in the same cars with intrastate passengers, but must pay the higher fares, while the intrastate passengers pay the lower fares for like services to the unlawful preference of the intrastate passengers and prejudice of the interstate passengers. (R. 95.)

Appellee rail lines' revenues under the lower intrastate fares in North Carolina are less by $525,000 per annum than they would be at the level of the corresponding interstate fares, and passenger traffic at the lower intrastate fares is not contributing its fair proportionate share of the revenue to enable such railroads to render adequate and efficient transportation service (R. 95-96).

Maintenance of these lower intrastate fares in North Carolina causes unlawful preference of persons in intra-

state commerce and prejudice against persons in interstate commerce, and unlawful discrimination against interstate commerce, and this unlawfulness should be removed by increasing the intrastate fares in North Carolina to the level of the corresponding interstate fares[3] (R. 96).

We then stress the general principles of law applicable to thirteenth-section proceedings which are to the effect that the I. C. C. has the power and the duty to deal with intrastate charges wherever they bring about either or both of the situations declared to be unlawful, that is, preference or prejudice as between interstate and intrastate passengers, or discrimination against interstate commerce, and that, upon so finding, the I. C. C. shall prescribe the rate or fare thereafter to be charged as will remove such preference, prejudice, or discrimination. In the first instance, the question is one of the relation between intrastate and interstate rates. In the second, the question is one of relation of rates to revenue. In either instance, the I. C. C. has full authority to regulate intrastate rates, first, however, finding that the interstate level is reasonable before requiring the intrastate rates increased to their level, and upon finding no substantial dissimilarity in conditions surrounding both kinds of transportation. In exercising its authority, the I. C. C. shall give due consideration to the need in the public interest of adequate and efficient railway transportation and of preserving the same to meet the needs of commerce, the postal service, and the national defense. The purpose of Section 13 is to make certain that the accomplishment of these ends shall not be thwarted by individual action of state authorities.[4]

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[3] *Alabama Intrastate Fares* (embracing N. C.) 258 I. C. C. 133.

[4] *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563
New York v. *United States*, 257 U. S. 591,
Florida v. *United States*, 282 U. S. 194,
Georgia Comm. v *United States*, 283 U. S. 765,
Alabama v. *United States*, 283 U. S. 776,
United States v. *Louisiana*, 290 U. S. 70,
Florida v. *United States*, 292 U. S. 1,
Ohio v. *United States*, 292 U. S. 498,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474

In the case at bar the appellants contend that the record did not justify the I. C. C.'s findings and that there is no evidence to support the same. As to the first, we at once point out that if there is evidence in the record to support its conclusions the order must stand, for the law as construed by this Court makes the I. C. C.'s findings of fact on substantial evidence conclusive.[5]

On all issues of reasonableness of rates, or discrimination therein, a long, unbroken line of decisions has firmly established the doctrine of the exclusive primary jurisdiction of the I. C. C. in respect thereof. Resort first must be made to the I. C. C. on such issues and when it has spoken thereon, as in this case, the only question is as to the supporting evidence.[6]

That 2.2 cents is a reasonable coach rate can not be doubted. In the case at bar the record shows, and the report of the Commission recites, that the I. C. C. reviewed the history of passenger fares from the year 1908. During that time the coach fares, under appropriate Federal regulation, were increased in 1918 from 2.5 cents to 3 cents and in 1920 from 3 cents to 3.6 cents, and were reduced in 1937 to 2 cents.[7] (R. 69, 71, 74.)

Under order of the I. C. C. of January 21, 1942, in *Ex Parte 148*, the railroads of the country were authorized to increase this 2-cent coach fare to 2.2 cents (R. 521). That was affirmed in the following report and order of March 2, 1942. Upon reexamination, that was reaffirmed in reports and orders of April 6, 1943, November 8, 1943, May 12, 1944, and December 12, 1944. In the last four orders the freight-rate increases which had been authorized were suspended;

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[5] *I. C. C. v. Jersey City*, 322 U. S. 503, 512;
Int. Com. Com. v. Union Pacific R. R., 222 U. S. 541, 547;
Florida v. United States, 292 U. S. 1, 12.

[6] *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.
Gt. No. Ry. v. Merchants Elev. Co., 259 U. S. 285.

[7] *Alabama Intrastate Fares*, 258 I. C. C. 133, 134, 137.

the 10 per cent passenger-fare increase was purposely retained.[8]

In authorizing this passenger-fare increase, the I. C. C. contemplated similar increases on intrastate traffic in the several states.[9] And, in suspending the freight-rate increases originally authorized and affirming and reaffirming the passenger-fare increase, the I. C. C. undoubtedly recognized that the increased passenger revenues would serve as a partial offset for the loss of the much greater amount of revenue incident to the suspension of the freight-rate increases for it advisedly retained the passenger increase.[10] The distribution of the so-called "transportation burden" as between freight and passenger services is as much within the exclusive jurisdiction of the I. C. C. as is such distribution among the various commodities transported.

As railroads can hardly expect to earn even a normal return in times of general business depression, they should be given opportunity to earn more than a normal return in times of prosperity. In no other way could sound economic conditions be maintained in railroad transportation. And certainly the present times may not be taken as indicative of future trends in railroad revenues.[11]

State authorities of Rhode Island refused to sanction the increase in commutation fare and the state authorities in Texas refused to sanction the increase of fares in sleeping and chair cars from 3 cents to 3.3 cents authorized in *Ex Parte 148*. In each instance, under thirteenth section pro-

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[8] *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 255 I. C. C. 357, 256 I. C. C. 502, 258 I. C. C. 455, 259 I. C. C. 159.

[9] *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 736.
Ex Parte 148, 255 I. C. C. 357, 361.

[10] *Ex Parte 148*, 255 I. C. C. 357, 385, 394.
Ex Parte 148, 259 I. C. C. 159, 194.

[11] *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 271.
General Commodity Rate Increases, 1937, 223 I. C. C. 657, 730.
Group of Investors v. Milwaukee R. Co., 318 U. S. 523, 543.

ceedings, both states' charges were increased to the interstate level.[12] The State of North Carolina in refusing the increase in coach fares to 2.2 cents, with similar action in Alabama, Tennessee, and Kentucky, cover the sole departures from sanctioning the 2.2-cent coach fares throughout the United States interstate and intrastate.

The I. C. C. has considered and reconsidered passenger fares. Appendix C furnishes a review of the cases at a glance. That 2.2 cents per mile is a reasonable rate for coach fares is abundantly supported by the record.

The I. C. C.'s findings of preference and prejudice as between interstate and intrastate passengers are supported by substantial evidence. In this brief we have stated these findings and the supporting evidence in the text, and in Appendix D hereto. Traffic and transportation officers of appellee railroads testified at length and in detail that the passenger trains are operated without regard to state lines; none is engaged wholly in intrastate commerce; both classes of passengers are handled in the same trains and under the same conditions. Mr. Hunter, one of the Commissioners of the North Carolina Commission, testified in the thirteenth-section proceeding on behalf of his Commission and stated that both interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254). Indeed, the North Carolina Commission in its order of July 8, 1943, stated (R. 140):

> "In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together . . ."

The I. C. C. made similar findings in the recent *Rhode Island case* and the *Texas case* growing out of *Ex Parte 148* and many others growing out of prior proceedings.

In such cases "typical instances" are sufficient to justify "general findings" to support a "state-wide" order.[13]

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[12] *Rhode Island Commutation Fares*, 254 I. C. C. 383, *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723.

[13] *Georgia Comm.* v. *United States*, 283 U. S. 765, 772, 774.

Witness Russell of Raleigh, N. C., offered by the North Carolina interests, in describing the coach service on his direct examination used as examples of his experience a trip that he made from Raleigh to Greensboro, N. C., (intrastate) thence to Greenville, S. C., (interstate) and returning, Greenville, S. C., to Asheville, N. C., (interstate) thence Asheville to Greensboro, N. C. (intrastate). He spoke for his business firm and on behalf of the North Carolina membership in the Travelers Protective Association. (R. 266, 267.)

Appellee railroads have suffered substantial revenue losses in North Carolina totalling over $525,000 per year by reason of the difference in the level of the intrastate and interstate fares.[14] This creates an unlawful discrimination against interstate commerce. Such loss to the affected railroads in North Carolina plus that in Alabama, Kentucky, and Tennessee amounted to $2,420,035 per year. These revenue losses grew out of a relatively small increase per passenger in the light of the fact that the average coach passenger in North Carolina travels approximately thirty miles (R. 170). Fifteen cents a head is individually small, but in the aggregate looms large with the result that the North Carolina intrastate coach traffic did not pay its proportionate share toward the maintenance of appropriate transportation service. Such service could not be rendered to travelers in North Carolina based on the wholly intrastate traffic (R. 175, 222). Both classes of passengers are handled under similar conditions. Failure of the state to sanction like increases clearly resulted in the state traffic paying a disproportionate share of the required revenue.[15]

Prosperity of the railroads is not controlling. The issue here is the contribution of the state traffic of its proportionate share. When disproportionate it is within the ex-

[14] *Alabama Intrastate Fares*, 258 I. C. C. 133, 146, 154.

[15] *United States* v. *Louisiana*, 290 U. S. 70, 75,
Florida v. *United States*, 292 U. S. 1, 12,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474, 485.

clusive jurisdiction of the I. C. C. to determine whether it is a discrimination against interstate commerce.[16]

There is no merit in appellants' contention that they were denied a full hearing before the I. C. C. The state received notice, and it took an active part in the thirteenth-section proceedings at the hearing, on brief, and oral argument. Its evidence was received and considered. Its petition for reconsideration and its petition for investigation of passenger fares were both considered. In denying it further hearing and investigation, the I. C. C. was acting within the rule which this Court has recognized for administrative tribunals.[17]

In conclusion, we stress the fact that the proper findings and conclusions have been made, they are supported by the record, all proper procedural steps were taken, a proper report and order issued which the District Court correctly upheld, and, having committed no error, its decree dismissing appellants' suit should be affirmed.

ARGUMENT.

The Ultimate Findings and Conclusions of the I. C. C. Are Grounded Upon Basic Findings of Fact, Adequately Supported by Evidence.[18]

The findings of the I. C. C.

The findings contemplated by the statute, Title 49, U. S. C., Sections 13(4) and 14,[19] were adequately made by the

[16] *Wisconsin R. R. Com.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586, 588.
Florida v. *United States*, 282 U. S. 194, 212.
United States v. *Louisiana*, 290 U. S. 70, 75.

[17] *New England Divisions Case*, 261 U. S. 184, 200.
I. C. C. v. *Jersey City*, 322 U. S. 503, 516, 517.

[18] In appendix D to this brief certain primary findings of the I. C. C. are set out and reference given to supporting evidence in the Record.

[19] Hereinafter we omit "Title 49 U. S. C." and refer to the Act by section number.

I. C. C. We quote them from its report, 258 I. C. C. 154-155 (R. 95-96):

"We find that—

"1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

"2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

"3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

"4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers,

"5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama; $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair

share of the revenues required to enable respondents to render adequate and efficient transportation service.

"6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State."

General principles of law applicable to proceedings under Section 13(3)(4).

The general principles of law applicable to proceedings of this kind are well settled by the decisions, particularly the following:

Wisconsin R. R. Com. v. *C., B. & Q. R. R. Co.*, 257 U. S. 563,
New York v. *United States*, 257 U. S. 591,
Florida v. *United States*, 282 U. S. 194,
Georgia Comm. v. *United States*, 283 U. S. 765,
Alabama v. *United States*, 283 U. S. 776,
United States v. *Louisiana*, 290 U. S. 70,
Florida v. *United States*, 292 U. S. 1,
Ohio v. *United States*, 292 U. S. 498,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474.

These decisions hold that Section 13 (3) (4) confers upon the I. C. C. the power and duty to deal with rates, fares, or charges "made or imposed by authority of any state" upon a finding that such rates, fares, or charges bring about either or both of two separate and distinct situations, both of which are declared to be unlawful:

> 1. Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand;
>
> 2. Any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Upon a finding, after hearing, that the charges imposed by state authority cause either or both of these unlawful things, the statute declares the I. C. C.—

> "shall prescribe the rate, fare, or charge, or the maximum or minimum or maximum and minimum thereafter to be charged, * * * in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination."

In the first of the two situations declared to be unlawful the question is one of the relation between the intrastate and the interstate rates, fares, or charges. *Florida* v. *United States*, 282 U. S. 194, 214. In the second situation declared to be unlawful the question is one of the relation of the rates, fares, or charges to revenue. The I. C. C. has full authority in the premises to regulate intrastate rates. *Florida* v. *United States*, *supra*. In the case just cited, this Court stated (282 U. S. p. 211):

> "* * * The authority granted by section 13(4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.
>
> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate

share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."

Likewise, in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585-586, it was said:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

It is settled also that before the I. C. C. may enter an order raising intrastate rates or fares under Section 13 (4) it must find:

> 1. That the general level of the *interstate* rates or fares (to which the intrastate rates or fares are to be raised) is itself reasonable. *Georgia Comm.* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70. As the Court said in the *Louisiana case*, 290 U. S., at page 79:
>
> > "* * * It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates,

raised to the reasonable general interstate level, would not themselves be reasonable; * * *."

2. That there is no substantial dissimilarity in the conditions surrounding the intrastate transportation, on the one hand, and the conditions generally surrounding interstate transportation to, from, or through the same state and surrounding territory, on the other hand.

In the Interstate Commerce Act, as amended, Congress has declared as the "national transportation policy" that the provisions of the Act shall be administered—

> "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

By Section 15a (2) of the Act the I. C. C. is directed, in the exercise of its power to prescribe just and reasonable rates, to give due consideration—

> "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

This duty to provide rates which shall insure an "adequate and efficient railway transportation service" is thus directly imposed upon the I. C. C. The very purpose of Section 13 (3) and (4) of the Act is to make it certain that the accomplishment of the desired end shall not be unduly interfered with or obstructed by the individual action of state authorities. This fact is plainly disclosed by the decisions of this Court above referred to.

To permit North Carolina to thwart the broad purposes of the I. C. C. reflected in its reports and orders in *Ex Parte 148* by requiring lower passenger fares within North

Carolina than the interstate level sanctioned by the I. C. C., would spread to other states. A similar situation arose in respect of the class rates, for freight transportation, which the I. C. C. had prescribed (R. 216) in *State Corp. Comm. of Virginia* v. *Aberdeen & Rockfish R. Co.*, 161 I. C. C. 273. The late Commissioner Eastman, speaking for the I. C. C., said at page 282:

> "* * * Reductions in intrastate rates in other southern States, several of which could justly claim a basis as favorable as North Carolina, could not fail to undo in large measure what was accomplished in the *Southern case.*"

If North Carolina can do this thing, why not Alabama, Tennessee, and Kentucky, and the others, as well? But for Section 13 and the I. C. C.'s orders made thereunder, it could not uphold its paramount authority and duty to give effect to the "national transportation policy."

The appellants contend that the Record did not justify the I. C. C.'s findings and there is no evidence to support the same.

The position of appellants may be stated to rest generally on two grounds, first, that the evidence of record did not justify the I. C. C.'s findings, and, second, that there is lack of evidence to support its findings.

In considering the first ground, we at once point out if there is substantial evidence in the record to support the conclusions of the I. C. C., and we submit there is, then its order must stand. The law makes the I. C. C.'s findings of fact on such evidence conclusive. In the recent decision in *I. C. C.* v. *Jersey City*, 322 U. S. 503, 512-513, it was said:

> "Each of the findings of fact by the Commission appears to be supported by substantial evidence. The court below has not found to the contrary, nor do we. Reasonable persons could no doubt differ as to whether

it is probable that 90 per cent of the patrons will purchase tokens, whether the revenues of the lines will increase more than the operating costs, and as to various other features of the contest.

"* * * The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. 'With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.' *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 550.

"'So long as there is warrant in the record for the judgment of the expert body it must stand . . .' 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'.' *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-46; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-87."

In *Int. Com. Com.* v. *Union Pacific R. R.*, 222 U. S. 541, 547, it was said:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its

decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Florida* v. *United States*, 292 U. S. 1, 12, is the following:

"• • • The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by Section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* The purpose for which the Commisison was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 100; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Assigned Car Cases*, 274 U. S. 564, 580; *Merchants*

Warehouse Co. v. *United States*, 283 U. S. 501, 508; *Crowell* v. *Benson*, 285 U. S. 22, 50, 51."

The I. C. C.'s finding that the interstate fares are reasonable is supported by evidence.

There is no merit whatever in the contention that the evidence fails to show the reasonableness of the interstate fares and charges which the railroads were directed to apply in North Carolina. In a proceeding under Section 13 of the Act the reasonableness of the interstate rates is necessarily an issue, since the I. C. C. "may not require intrastate rates to be raised above a reasonable level." *Georgia Comm.* v. *United States*, 283 U. S. 765, 770. Since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, followed in an unbroken line of cases including *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, the doctrine of exclusive primary jurisdiction of the I. C. C. in respect of the reasonableness of rates is firmly established. Here the I. C. C. has spoken. The only question is as to supporting evidence.

In its report (R. 69) the I. C. C. gives the history of these fares and charges and the reasonableness of said fares and charges, and the results of the passenger operations of the railroads during the period 1936 down to and including the month of December, 1943, are discussed at length (R. 71-82).

In the light of the I. C. C.'s recent investigation and findings with respect to interstate passenger fares throughout the country, it would appear that the reasonableness of such fares and charges is not open to question.

In *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545 (commonly referred to as "Ex Parte 148"), the I. C. C., after an extensive investigation of freight rates and passenger fares throughout the country, entered on January 21, 1942, a preliminary order authorizing a general increase of 10 per cent in passenger fares as proposed by the carriers. In this order it was recited:

"That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges; * * *." (R. 521-522.)

It was further said:

"And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful; * *." (Emphasis supplied.) (R. 522.)

Thereafter, in the report of March 2, 1942, in the same proceeding, it was said referring to passenger fares (248 I. C. C., 564-566):

"The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, *the lowest rate per mile in railroad history.* The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 per cent less than in 1930, but the number of passenger-miles was 2.82 per cent greater, and the average mile revenue, 35.4 per cent less, than in 1930.

* * * * *

"The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. * * *

"Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute toward meeting the added operating costs of the railroads.

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares, subject to a suitable rule for the disposition of fractions stated in the order.

* * * * *

"The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed." (Emphasis supplied.)

Subsequently *Ex Parte 148* was reopened for further hearing. This was in response to petitions filed by the Office of Price Administration, state regulatory bodies, and others, wherein it had been alleged, in substance (255 I. C. C., 360):

"* * * that the financial condition of the petitioning railroads had *so improved since the original decision herein, chiefly by subsequent increase in the volume of traffic,* as to render unnecessary the continuance of the increases we authorized. Some of these protestants who filed petitions for reopening alleged that the increases were *inflationary in effect, and incompatible with the principles of economic policy adopted by Congress,* and that, if the increases should be allowed to remain in effect, the success of the Government's program to prevent inflation would be jeopardized." (Emphasis supplied.)

The report of April 6, 1943, in the reopened proceeding, shows that the Office of Price Administration was represented and participated during the hearings and at the

argument. The report further shows that, pursuant to the provisions of Section 13 (3) of the Act, a designated committee of state commissioners "sat with us throughout the hearing and argument, and has conferred with us as to the determination of the issues;" and it was further said (255 I. C. C., 361):

> "While the members of the cooperating committee have not considered the draft of this report, we have been in contact with all of them through their chairman, and are authorized to say that they concur generally in the conclusions hereinafter stated."

Upon the evidence presented at such further hearing in February, 1943, and after consideration of the latest available reports of railroad earnings, as well as forecasts made by a witness for the O. P. A. respecting anticipated earnings for the entire year 1943, the I. C. C. suspended until January 1, 1944, the increases in freight charges previously authorized and canceled the increases authorized in passenger commutation fares. The I. C. C., however, declined to modify its previous findings with respect to the increases in standard passenger fares, and stated as follows in the report (255 I. C. C., 394):

> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight.
>
> "Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the

surcharges that became effective in that year. *Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I.* The actual revenue collected per passenger-mile is considerably below the standard rate of fare, and is influenced by the reduced and special fares accorded, certain of which have been previously discussed, and by the application of direct-line fares over circuitous routes. The actual revenues per passenger-mile, all classes including commutation, collected in the years 1921-27, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per passenger-mile were 1.90, 1.87, and 2 cents for 1940, 1941, and 1942, respectively." (Emphasis supplied.)

In this report, dated April 6, 1943, the I. C. C. made the following specific finding (255 I. C. C., 393):

"We find that, under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, if their freight rates and charges be reduced by the amounts resulting from our previous authorizations of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof."

It must be assumed that in making the finding just quoted and in ordering the temporary suspension of the freight-rate increases, the I. C. C. contemplated that the railroads would continue to receive, as a partial offset, the increased revenue from passenger fares other than commutation fares. Distribution of the "transportation burden" is peculiarly within the administrative discretion of the I. C. C. It must be assumed also that this passenger revenue was expected to be derived from intrastate as well as interstate traffic, especially in view of the fact, as pointed out in the report, that at that time *only two* state commissions, namely, the Commissions of New Jersey and Texas, "specifically

asked for the removal or reduction of the increase on standard passenger fares" (255 I. C. C., 375).

In *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 736, it was stated:

> "The petition filed by the carriers with us on December 13, 1941, seeking increases in their rates, fares, and charges on interstate traffic, docketed as Ex Parte No. 148, was so limited because of our jurisdiction, but it reflected the proposal of the carriers to make the increases Nation-wide and indicated their purpose to petition the respective State commissions for like increases on intrastate traffic."

In his concurring opinion in *Ex Parte 148* reopened, the late Commissioner Eastman said (255 I. C. C., 403):

> "* * * * I concur in the conclusions which have been reached by the majority herein. In that concurrence, I include the conclusion that the authority to increase passenger fares, other than commutation fares, should not be revoked. The reasons for that conclusion are adequately and effectively stated in the main report."

The record here shows, and the I. C. C. finds, that as late as October 11, 1943 (only a short time prior to the hearings in the four thirteenth-section cases), the I. C. C. denied petitions filed by the Office of Price Administration and the Alabama and North Carolina Commissions seeking institution of a further investigation of interstate passenger fares in the South (258 I. C. C., 143).

In the third report in *Ex Parte 148*, dated November 8, 1943 (256 I. C. C. 502), the freight-rate increases were further suspended to June 30, 1944, but the increase in standard passenger fares was continued. The I. C. C. stated at page 505:

> "We have given further consideration to the evidence in this proceeding, including current statistical data in the way of the specified periodical reports of the petitioners which it was earlier stipulated we might

consider, and also to the returns to the show-cause order."

In the fourth report in *Ex Parte 148* of May 12, 1944, 258 I. C. C. 455, the freight-rate increases were further suspended to December 31, 1944. But the increase in standard passenger fares was again continued. The I. C. C. stated (p. 458):

"We have given further consideration to the evidence in this proceeding, including current statistical data in the way of the specified periodical reports of the petitioners as stipulated by the parties, and also to the returns to the show-cause order. *We find that although petitioners' net railway operating income and net revenue from railway operations have shown a definite downward trend in recent months*, the revenues received by the railroads from their present freight rates and charges under present conditions, and, so far as we can reasonably foresee, for the period to and including December 31, 1944, will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) of the act." (Emphasis supplied.)

In the fifth and last report in *Ex Parte 148* of December 12, 1944, 259 I. C. C. 159, the freight-rate increases were further suspended to December 31, 1945. But the increase in the standard passenger fare was again continued. The I. C. C. stated (p. 194):

"Passenger traffic for the entire period from 1930 to 1941, inclusive, failed to pay its proper share of expenses. Even with the large increase in passenger traffic in 1942, the operating ratio for passenger and allied services remained decidedly less favorable than the operating ratio for freight.

"Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare (plus Pullman surcharges) that became effective by our authorization in that year. Coach fares on the present basis

of 2.2 cents per mile are 26 per cent lower than the 3-cent level prevailing interstate during and before World War I. In fact, even after the war much higher fares were charged on local business in large sections of the country. The actual revenue collected per passenger-mile is considerably below the standard rate of fare. It is influenced by the offering of reductions in round-trip fares, by the application of direct-line fares over circuitous routes, and by special reduced fares maintained for furloughed and discharged personnel of the armed forces. The actual revenues per passenger-mile collected in the years 1921-27, including commutation traffic which is carried on fare bases below the average, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per pasenger-mile were 1.90, 1.87, 2.09, and 1.93 cents for 1940, 1941, 1942, and 1943, respectively.

"We find that no modification of our previous findings, orders, and authorizations respecting passenger fares is warranted."

We submit as Appendix C (bound separately) a chronological history of consideration of passenger fares by Federal authority.

In the light of such thorough and recent investigation and findings thus shown to have been made by the I. C. C., we can conceive of no reason to conclude that the interstate passenger fares applicable throughout the country (including the fares in North Carolina) are unreasonable.

It is not necessary to repeat here all that the I. C. C. said in its report in Docket 29036, the North Carolina case. It is sufficient to point out that heretofore the intrastate fares in North Carolina have been the same as the interstate fares (258 I. C. C., 143); that the intrastate coach fares applicable in North Carolina were subnormal fares established primarily to attract traffic that had been diverted to private automobiles (258 I. C. C., 134-135); and that a basic coach fare of 2 cents per mile was found reasonable by the I. C. C. for application throughout the United States in *Passenger Fares and Surcharges*, 214 I. C. C. 174. The

fares found reasonable in the case just cited were authorized to be increased 10 per cent in *Ex Parte 148* (248 I. C. C. 545, 565, 566), and the railroads in Alabama, Tennessee, Kentucky, and North Carolina were authorized to bring their interstate fares up to the normal level (258 I. C. C. 133, 136).

In its report, the I. C. C. stated at page 143:

> "* * * The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10-percent increase authorized in Ex Parte No. 148. *These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us.* It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents." (Emphasis supplied.) (R. 81, 82.)

In its report, under the caption "Level of the Interstate Fares" (258 I. C. C. 137), the I. C. C. also compares the 2.2 cents interstate coach fare with fares in effect during previous years and as far back as April 1, 1908; finds that "economic conditions have greatly changed" since the decision in *Passenger Fares and Surcharges, supra*, in 1936; shows that the principal railroads in North Carolina sustained heavy operating deficits over a long period of years prior to the war (pp. 138-140); and takes note of the increases in revenue, both freight and passenger, growing immediately out of the increased volume of traffic attributable to war conditions (p. 140); as well as "the added burdens on the passenger departments and facilities" of the railroads under war-time operations (p. 141).

At page 140 of the report, it is stated:

> "The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue for the southern region and 7.4 and 27.2 percent, respectively, for the country; but in a reduction in net railway operating income from all rail operations of 61.4 percent for the southern region and 55.9 percent for the country. For the year 1943, the increase over 1942 was 13.3 percent in freight revenue and 67.9 per cent in passenger revenue for the southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of the railroads of the country, including those in the southern region, have been quite steadily declining. Thus in July 1943, that increase was 74.4 percent for the southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 per cent for the southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; *so that, due to increased expenses and taxes, the net railway operating income of the railroads in the southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943.*" (Emphasis supplied.) (R. 78, 79.)

Each and all of the findings of the I. C. C. with respect to the reasonableness of the interstate fares are supported by evidence of record. Testifying in the thirteenth-section proceeding, Witness Tassin submitted statistical data with respect to the thirteen railroads operating in North Carolina (R. 315-382). Passenger traffic officers of the rail-

roads showed the history of the fares, both state and interstate; large expenditures that have been made for improvement of passenger equipment and service; and numerous increases in operating expense attributable directly to wartime operations (R. 151, 166, 180, 184, 235).

The truth of the principle that over a period of years the railroads must have adequate revenues has always been recognized by the I. C. C. In *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 271, it was said:

> "Then, too, a railroad must be allowed to accumulate a surplus in good years which will offset bad years, and if its financial position is to be a reasonably strong one that surplus must be large enough to remove doubt from the mind of the investing public. We think that a railroad in ordinary years should be permitted to show a substantial surplus over and above the payment of a reasonable dividend. This is necessary to provide for interest on capital invested in improvements which will not yield an immediate return, to take care of the element of obsolescence, and to tide over years of depression."

And in *General Commodity Rate Increases, 1937*, 223 I. C. C. 657, 730, it was said:

> "However, recognition of this fact that the railroads cannot hope in times of economic depression to earn a normal return carries with it recognition of the complementary principle that they should be given an opportunity to earn more than a normal return in times of prosperity."

It is clear, we think, that in order to promote sound economic conditions in transportation and to develop and preserve a national transportation system adequate to the needs of the country, the I. C. C. is not only required to consider the current earnings of the carriers but must also consider their past earnings and probable future financial requirements. It is well known that the carriers have not been able during the present emergency period to maintain their properties and equipment at the usual standard; that

the wear and tear on their properties and equipment have been unusually great; that they have been unable to obtain much needed equipment; and that these facts have resulted in their rates of return being overstated. See *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 731-732. It is also well known that after the war the carriers must inaugurate extensive rehabilitation and improvement programs, and must obtain much new and modern equipment. Nevertheless, the I. C. C. found, as we have shown, that due to increased expenses and taxes the net railway operating income of the railroads in the Southern region has decreased materially in recent months, having dropped from $28,578,717 in December, 1942, to $11,035,942 in December, 1943.

Very recently this Court pointed out the unreliability of "war earnings" as a guide for the future. It was said in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 543:

> "As some of the bondholders point out, the bulge of war earnings *per se* is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year."

The I. C. C. gave consideration to the intrastate fare of 1.5 cents increased to 1.65 cents. On pages 135-136 of the report, 258 I. C. C., the I. C. C. states:

> "On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and

the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees).

"In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful. (R. 72.)

. . . . . .

"On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. *Having found in Passenger Fares and Surcharges, supra, that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners,* we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic." (Emphasis supplied.) (R. 73.)

It is clear that the I. C. C. did not approve the 1.65-cent fare as a maximum reasonable one. It was the outgrowth of the experimental fare of 1.5 cents which certain of the Southern carriers published for interstate and intrastate application throughout Southern territory in an attempt to attract additional travel to the railroads in competition with other forms of transportation, particularly with the private automobile and busses. (Exhibit 1, R. 296.)

We submit that the finding of the I. C. C. as to the reasonableness of the interstate fares is fully supported by the record.

The I. C. C.'s findings of preference and prejudice as between interstate and intrastate passengers are supported by evidence.

In its report (258 I. C. C. 133), the I. C. C. makes the following findings, among others:

> "Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers" (p. 145, R. 85).
>
> "Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances." (Typical examples of such differences are then given) (pp. 145-146, R. 85).
>
> "So also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State" (p. 146, R. 85).
>
> "All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same" (p. 146, R. 86).
>
> "The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (p. 146, R. 86).
>
> "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four states" (p. 153, R. 94).
>
> "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin*

R. Comm. v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges, supra*" (p. 153, R. 94).

Each and all of these findings by the I. C. C. are supported by evidence of record. That interstate and intrastate passengers use the same trains and that all trains are available to interstate and intrastate passengers alike is shown by the testimony of railroad witnesses.

Witness Blackwell testified that in the operation of trains into, out of, and across North Carolina no distinction is made with respect to interstate and intrastate passengers. Both travel in the same coaches. In the physical operation of trains in North Carolina none is operated solely for intrastate travel. (R. 154, 155.)

Witness Barry testified that no distinction is made in the handling of interstate and intrastate passengers into and out of the State of North Carolina or within the State of North Carolina (R. 301).

Witness Makinson testified along similar lines, and added there is no difference in the equipment of through trains (R. 236).

Commissioner Hunter, a witness on behalf of the North Carolina Utilities Commission, testified that both interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254).

In the report and order of July 8, 1943, in which the North Carolina Utilities Commission refused to grant the petitioning railroads authority to increase the 1.65-cent rate to 2.2 cents, the Commission stated:

"'In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together, . . .'" (R. 140.)

There are nine through passenger trains operated by Southern Railway north of Charlotte in each direction, or eighteen in all (Witness Barry R. 174).

Witness Barry further testified that the "Streamliners" on Southern Railway make six stops in the State of North Carolina, and that they pick up passengers in that state and carry them to another point in North Carolina (R. 176, 177). He further stated that streamliners are generally known as coach trains on which there are reserved seats, and when they are sold to capacity no more tickets are sold (R. 289).

The finding of the I. C. C. that interstate passengers in the State of North Carolina travel in the same trains and generally in the same cars with intrastate passengers, for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and undue and unreasonable disadvantage and prejudice of the interstate passenger is warranted by the evidence of record. At page 145 of its report, 258 I. C. C., the Commission finds that—

> "Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers. Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances." (R. 85.)

The record shows that passengers are actually traveling from a point without the State of North Carolina to a point within the state, and are also traveling from a point within the state to another point within the state (R. 312).

Examples filed by Witness Barry show the higher fares paid by interstate passengers than those paid by intrastate passengers for approximately the same distance (R. 310).

Testimony of similar import was given by Witness Lynch (Exhibit 7, R. 314) and by Witness Makinson (Exhibit 13, R. 383).

Witness Makinson testified as follows:

"On Seaboard Railway train No. 18, of November 16, 1943, there were two passengers on the train, and I have the tickets that each one of them surrendered. One is an intrastate ticket from Norlina to Littleton, North Carolina. The other is an interstate ticket from Norlina to Portsmouth, Virginia. One man paid 1.65 a mile and the other paid 2.2 cents a mile. (R. 239.)

* * * * * * * * * * *

"The Witness: Same train, starting in North Carolina, ending up in Virginia.

"Here is another, two more tickets, train No. 9, starting on November 17th, ending November 18, 1943, two passengers on that train. One had a ticket from Raleigh to Hamlet, which was intrastate. He paid 1.65 cents a mile for his ticket. Another passenger in the same coach had a ticket from Raleigh to Athens, Georgia, for which he paid $8.47, which was the rate 2.2 cents a mile plus the tax." (R. 239, 240.)

Witness Haynes testified that his investigation developed that business concerns located outside of the State of North Carolina ship their products into that state in competition with those located within the state. Salesmen and sale supervisors for these interstate concerns travel by train into North Carolina and pay the interstate fares. (R. 191, 192.)

This witness further testified that among the manufacturing concerns which do business in North Carolina in competition with similar businesses within that state are fertilizer, scrap dealers, glass and paints, flour and feed mills, creosoting plants, tobacco, pulpwood, paper container companies, shoe manufacturers, log and lumber, foundry and machine, cotton mill supplies, electric supplies, fire extinguisher, plumbing fixtures, belting, and brick and tile (R. 191-195, 199-200).

Mr. B. F. Russell, of the E. F. Craven Co., Greensboro, N. C., a concern which deals in heavy-construction equipment, testified (R. 266) in behalf of that concern and also as a representative of more than 3,600 members of

the North Carolina Division of the Travelers Protective Association. He said his company has salesmen traveling within the state, and they are traveling more by train now than ever before. When asked would the increase sought mean anything to his company, he said (R. 267): "It would, yes, sir. It would cost us more money for the traveling of the men." That shows the intrastate passenger is presently preferred.

The I. C. C., on pages 146-147 of its report, (R. 85, 86) gives illustrations of the differences in fares paid by interstate and intrastate passengers traveling approximately the same distances. The I. C. C. also gives illustrations to show the differences in the one-way fares over intrastate and interstate routes between points in the same states, and points out that similar situations are shown with respect to round-trip fares. These illustrations have basis in the record.

It is difficult to see how evidence could more clearly show the preference to intrastate passengers and intrastate routes than those mentioned by the I. C. C., and the other ilustrations in the record. Appellants, however, contend that the evidence is insufficient in that no passenger, or prospective passenger, complained of the differences in fares, and no actual damage to interstate passengers was shown specifically. They forget their own witness Russell.

It seems to us that the damage to the interstate passengers and the interstate routes is obvious. It would have been a waste of time and effort to have interstate passengers or prospective passengers at the hearings to testify to the obvious. The following language of the I. C. C. from its report in *Rhode Island Commutation Fares*, 253 I. C. C. 383, 389, is to the point:

> "The foregoing illustrations are typical of others where, for the same or even shorter distances, interstate commuters now pay more than intrastate commuters traveling on the same kind of ticket subject to like restrictions. In other words, the interstate and

intrastate commuters ride on the same train, yet for identically the same service the interstate passenger is required to pay a higher rate of fare than the intrastate passenger. A little deductive reasoning is all that is required to spell out of those facts the undue prejudice and disadvantage and the undue preference and advantage forbidden by section 13 (4) of the act.

"No one contends that the economic condition of the average intrastate commuter is any different from that of the interstate commuter. Plain justice demands, therefore, that the 10-percent increase be paid by both or by neither. In view of our findings in Ex Parte No. 148 in respect of the need for an increase in the interstate fares, and in the light of this record, it is clear that the only reasonable and lawful course to pursue is to require a like increase in these intrastate fares."

Similar findings were made in *Increases in Texas Rates, Fares, and Charges,* 253 I. C. C. 723. Both the *Rhode Island case* and the *Texas case,* like the instant proceedings, grew out of the denial by state authorities of certain *Ex Parte 148* increases; and in both the I. C. C. ordered removal of the undue preference, prejudice, and discrimination thereby created.

Here we have a case in which the intrastate fares in North Carolina were lower than the corresponding interstate fares into and through that as well as other Southern states, some of which are immediately adjacent to it. The fact that this difference is material and without justification, that it affects a large number of interstate passengers, and that the prejudice to such passengers is obvious; makes out a case under Section 13(4) of the Act of preference and prejudice as between persons in intrastate and interstate commerce. It needs no argument to show that to charge two passengers, who may be riding in the same train and, perhaps, in the same seat, different fares for the same service amounts to unjust discrimination.

It can not be doubted that the power of the I. C. C. under Section 13(4) is broader than it is under Section 3(1). It

is to be noted that throughout Section 3(1) the word "particular" appears. It is made unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage to "any *particular* person, company ,etc." In Section 13(4), on the other hand, the word "particular" does not appear. The prohibition there is against *any* undue or unreasonable advantage, preference or prejudice "as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

The broader scope of Section 13(4) is also indicated by the fact that its purpose is to foster and protect interstate commerce and the national transportation system, whereas the purpose of Section 3(1) is to prevent undue preference and prejudice as between individual shippers or passengers. To hold that Section 3(1) and that portion of Section 13(4) which deals with preference and prejudice as between persons and localities mean precisely the same thing would be equivalent to saying that Congress had indulged in needless repetition and that the differences in the language used mean nothing.

But whether or not the power of the I. C. C. under Section 13 is broader than it is under Section 3, the evidence in the instant case is sufficient to justify a state-wide order under Section 13(4). The I. C. C. has found, and it is a fact, that interstate and intrastate passengers are carried on the same trains and generally in the same cars; that all trains operated by appellees in each of the states are available to, and are used by, both interstate and intrastate passengers; that the services accorded to both classes of passengers are substantially the same; and that prejudice against the interstate passenger and preference in favor of the intrastate passenger exists "*on every mile of track operated in passenger service by each of the respondents in all four of these states*, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (258 I. C. C. 133, 146). A differ-

ence in fares under these circumstances is manifestly preferential and prejudicial. And the damage to the interstate passengers resulting therefrom is made plainer by the fact that the volume of interstate and intrastate passenger traffic over appellees' lines is large and the difference in the charges paid by the two classes of passengers is great.

The views taken by appellants of the "prejudice or preference as between persons" provision of Section 13(4) are too narrow. The opinion in *Georgia Comm.* v. *United States*, 283 U. S. 765, leaves no doubt as to the power of the I. C. C. to make a state-wide order under this part of Section 13(4) upon a finding of "typical instances" which are sufficient to justify "general findings." In that case the Court was dealing primarily and particularly throughout the opinion with the so-called "persons-locality" provision of Section 13(4) and upheld an order of the I. C. C. under that provision which was state-wide in its scope. The Court said (p. 774):

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579. Compare Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 83. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. *To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief.*" (Emphasis supplied.)

And further said (p. 772):

> "The order here challenged is statewide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully

drawn order, otherwise valid and practicable of operation over a wide territory."

The facts in the instant case are even stronger than they were in the *Georgia Public Service Commission case* because, as the I. C. C. has found, the conditions surrounding the transportation of interstate and intrastate passengers are not in any instances "divergent," but are substantially the same.

The District Court well stated it (56 F. Supp. 606, 618):

> "* * * The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a state-wide scale a general finding of discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares."

The I. C. C.'s finding of unlawful discrimination against interstate commerce is supported by evidence.

In its report, the I. C. C. makes the following finding (258 I. C. C. 133, 154):

> "5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." (R. 95, 96.)

The above finding of the I. C. C. is supported by evidence of record.

Statement 1 of Exhibit 9 (R. 317) filed by Witness Tassin shows the gross revenue loss of the North Carolina railroads, individually and collectively, by reason of the refusal of the North Carolina Utilities Commission to permit the fare of 1.65 cents per mile to be increased to 2.2 cents per mile. Had the increase sought in intrastate passenger fares between points in North Carolina been in effect between December 1, 1942, and September 30, 1943, $465,578, additional revenue would have been earned by the thirteen railroads parties to the petition filed with the Interstate Commerce Commission. On basis of a year, that would have amounted to $558,694. This statement further shows that for the twelve months ended February 28, 1943, the amount would have been $432,150, and for the twelve months ended September 30, 1943, $566,823.

At page 154 of its report, the I. C. C. says:

> "The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section 13 (4) of the act empowers us to increase intrastate rates or fares so that the intrastate traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States* v. *Louisiana*, *supra*, page 75; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474. 'The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried • • • under substantially the same conditions.' *Illinois Commerce Comm.* v. *United States*, *supra*, page 485." (R. 94-95.)

The I. C. C. in its order of January 21, 1942, in *Ex Parte 148*, found that the increase in passenger fares therein

approved was necessary to meet, in part, increased operating expenses and to enable the carriers "to continue to render adequate and efficient railway transportation service during the present emergency," and it specifically found that these fares would be reasonable and lawful (R. 522).

As stated in the *Wisconsin case*, 257 U. S. 563, 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. * * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

Statement 1 of Exhibit 9 (R. 317) shows that the intrastate passenger traffic in North Carolina failed to pay its "fair proportionate share" of the cost of maintaining an adequate system of railroad by more than $500,000 per annum. Certainly, it can not be questioned that the low intrastate fares responsible for this result caused undue, unreasonable, and unjust discrimination against interstate commerce. Incidentally, for the four states of North Carolina, Alabama, Kentucky, and Tennessee the annual loss amounted to $2,420,035 (Exhibit 10, page 2, R. 343).

The law does not contemplate that the interstate passenger should contribute more than his proportionate share of the cost of maintaining an adequate railway system simply because the railroad is prosperous. The intrastate passenger as well as the interstate must contribute his "proportionate share" at all times; in times of depression as well as in times of prosperity. The service being the same, it follows their share of contribution must be the same. The I. C. C. aptly said in *Rhode Island Commutation Fares*, 253 I. C. C. 383, 389:

> "No one contends that the economic condition of the average intrastate commuter is any different from that of the interstate commuter. Plain justice de-

mands, therefore, that the 10-percent increase be paid by both or by neither."

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, it was said:

"* * * Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

In *Florida* v. *United States*, 282 U. S. 194, 211, it was said:

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic *should pay 'a fair proportionate share' of the cost of maintenance.* And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it." (Emphasis supplied.)

Again, in *United States* v. *Louisiana*, 290 U. S. 70, 75, it was said:

"* * * So construed, section 13(4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property

devoted to the transportation service, both interstate and intrastate."

The record here shows, and the I. C. C. found, that the intrastate coach traffic in North Carolina was failing to contribute its fair proportionate share of the revenue needed for the maintenance of an adequate transportation system —in North Carolina by at least $525,000 per annum.

We repeat, the record shows unequivocally that the intrastate passenger in North Carolina receives the same service as the interstate passenger, and, further, that the transportation conditions are the same in North Carolina as in other Southern states. It follows, therefore, that the intrastate passenger should pay the same fare. He should share the expense of operating the railroads on an equal basis with the interstate passenger. Justice demands this regardless of whether the railroads are in the throes of depression or are very prosperous. The failure of the intrastate traffic to make its fair contribution towards the maintenance of an adequate railway system, we submit, is decisive of the issue of unjust discrimination against interstate commerce by reason of the maintenance of lower intrastate fares.

The appellants charge that the I. C. C. acted arbitrarily in that it made no specific finding that an intrastate fare of 1.65 cents per mile is noncompensatory or fails to yield more than the actual cost of transporting an individual passenger. We submit the I. C. C. was not required to make any such finding. Its powers and duties under Section 13(3)(4) relate solely to the matter of *discrimination, preference, or prejudice and the removal thereof.* True, it must find that the level of the *interstate* fares is reasonable before it may order a raise of the intrastate fares to such level. *Georgia Comm.* v. *United States, supra.* But an intrastate fare may be above the actual cost of the service but still be unduly low and unreasonable in its relation to the comparable reasonable interstate fare.

Here we have a situation in which the I. C. C., after a nation-wide investigation in *Ex Parte 148*, has found and declared that the present general level of interstate fares on the basis of 2.2 cents per mile is just and reasonable. It has further found and declared that the revenues derivable therefrom *are needed* for the maintenance of an adequate transportation system under the existing unprecedented emergency conditions growing out of the war. It has also found that the conditions surrounding intrastate transportation in North Carolina are in no substantial respect different from those surrounding interstate transportation. It was not required to make any specific finding that the intrastate fares either are or are not "compensatory."

Trains of the railroads operating in North Carolina operate also in other states. Intrastate as well as interstate passengers travel on such trains. It is obvious that not one of these roads could by any possibility maintain its present train service in and through North Carolina were it solely dependent for its revenue upon intrastate traffic in such state alone. If such traffic fails to contribute its proportionate share of operating expenses, the burden of making up the difference must fall upon the interstate transportation.

As was said in the *Wisconsin case, supra* (p. 588):

> "* * * Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them."

And as the I. C. C. pointed out in *Rhode Island Commutation Fares, supra*, "plain justice" demands that the *Ex Parte 148* passenger-fare increase be paid by both interstate and intrastate passengers *or by neither*.

The decisions above referred to show also that the question whether the railroads are in need of additional revenue is of no legal significance in any litigation involving Section 13(3) (4). Neither the history of that section nor its inter-

pretation by this Court supports such a theory. Such theory would defeat the very purpose for which Congress framed the plan for maintaining a national transportation system. That Section 13 would be nullified under such a contention is evident. We do not think anyone would seriously contend that the railroads would have to show, in a proceeding under Section 13, that they were in a state of bankruptcy before they could obtain relief, or show that without the additional intrastate revenue they could not perform their public duty. If this test is to govern it would defeat any Section 13 case. This is so, because even in the lowest period of the depression, 1932, the railroads (including appellees here) continued to perform their public duty. Moreover, if this test is to govern it would lead to the absurd conclusion that in times of prosperity the states could require intrastate passengers to be carried for nothing—or at least for a charge barely above the limit of actual confiscation.

The facts which would justify a finding that the low intrastate fares are unlawful as a discrimination against interstate commerce are the same whether the railroads are prosperous or insolvent. And if the facts are such as to show that the intrastate business is not contributing "its fair proportionate share" of the cost of maintaining an adequate railway system, then, we submit, the unlawful discrimination is proved. The financial status of the railroads does not control. The intrastate passenger as well as the interstate must contribute his "fair proportionate share" at all times—in times of depression as well as in times of prosperity.

The I. C. C. has the power to raise intrastate fares to remove an unjust discrimination against interstate commerce. The determination of the issue of discrimination is within the exclusive jurisdiction of the I. C. C. The order entered by it, and under attack in this proceeding, based as it is on substantial evidence of record, must be sustained as a valid one. The record establishes a clear case of undue and unlawful discrimination against interstate commerce.

The Order of the I. C. C. Was Made After Full Hearing.

Appellants' contention that the I. C. C. denied them the full hearing to which they were entitled is without merit.

A complete answer to this contention is found in the report of the I. C. C., 258 I. C. C. 133. As therein shown, after institution of the investigation under Section 13 of the Act, and after due notice to the state authorities as provided in that section, hearings were held, briefs were filed, and oral argument had before the entire I. C. C. (R. 70, 71).

The transcript in this Court of evidence before the I. C. C. covers 152 pages of testimony and 20 exhibits in 114 pages—a total of 266 printed pages. Representatives of the North Carolina Utilities Commission testified at the hearing before the I. C. C. Examiner. Its attorneys filed a voluminous brief and participated in the oral argument.

The report of the I. C. C., dated March 25, 1944, was released and served on March 30, 1944. No order was entered at that time, it being stated in the report (258 I. C. C. 133, 155):

> "In accordance with our practice in such proceedings, we shall leave to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order." (R. 96.)

On April 26, 1944, the North Carolina Utilities Commission filed a petition with the I. C. C. for an extension of the thirty-day period and for reopening, reargument, and reconsideration by the I. C. C. of its report of March 25, 1944 (R. 449-488). The railroads replied (R. 490-505). The petition was denied by the I. C. C. on May 8, 1944 (R. 508).

On May 8, 1944, the I. C. C. issued the order here complained of (R. 507).

In the *New England Divisions Case*, 261 U. S. 184, 200, it was said:

> "* * * A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized and observed, these essentials of a full hearing."

It will thus be seen that there can be no ground of support for any claim that a "full hearing," as provided in Section 13 of the Act, was not had.

Neither can it be contended successfully that the I. C. C. acted arbitrarily in that, on October 11, 1943, it denied petitions of the O. P. A. and the North Carolina and Alabama Commissions for the institution of a further investigation of interstate passenger fares in the South.

The I. C. C. says in its report (258 I. C. C. at 143):

> "In July, 1943, the North Carolina Utilities Commission filed with us a petition for a general investigation on our own motion of the lawfulness of the interstate coach fares to, from, and through North Carolina. That petition, together with petitions dated July 31, 1943, of the Price Administrator and August 27, 1943, of the Alabama Public Service Commission for a general investigation of the reasonableness, under present conditions, of the interstate coach fares of all of the railroads in southern territory, was denied by our order of October 11, 1943. The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10 percent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule

that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

The reasonableness of the coach fares applying interstate throughout the whole country and intrastate in 44 of the 48 states was considered by the I. C. C. in the report here under attack and reviewed therein under the caption "Level of the Interstate Rates," at pages 137 to 143.

The refusal of the I. C. C. to further investigate was a matter well within its discretion, and does not constitute an abuse of discretion which would invalidate its order. In the recent decision in *I. C. C.* v. *Jersey City*, 322 U. S. 503, it was said at 517:

"The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. *United States ex rel. Maine Potato Growers & Shippers Assn.* v. *Interstate Commerce Commission*, 88 F. 2d. 780, 784, cert. denied, 300 U. S. 684; *Mississippi Valley Barge Line Co.* v. *United States*, 4 F. Supp. 745, 748; *Union Stock Yards Co.* v. *United States*, 9 F. Supp. 864, 873; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972; *R. C. A. Communications* v. *United States*, 43 F. Supp. 851, 858."

Another significant statement was made in the same opinion at page 516:

"This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the district resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where

> the Commission decided that it was able on the record before it to consider the effect of the factors suggested by the appellants and that a new cost study was unnecessary. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 480. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 769-70."

The denial by the I. C. C. of the North Carolina Commission's petition of April 26, 1944, for reopening, reargument, and reconsideration, being a matter within the discretion of the I. C. C., it follows that it did not err as a matter of law in denying the state's petition.

CONCLUSION.

We submit that the Interstate Commerce Commission in the North Carolina case, Docket 29036 (258 I. C. C. 133), has made the essential basic findings to support the ultimate conclusions it reached and upon which the order herein attacked was entered. Those findings and the ultimate conclusions and the order thereon are supported in the record by substantial evidence. All proper and appropriate procedural steps were taken, including notice, hearing, receipt of material evidence, briefs, and oral argument, on behalf of the interested parties, consideration of the record so made, and the report and order issued in due season, all in keeping with the provisions of the applicable statutes. The District Court correctly so held and committed no error in refusing the injunction and dismissing

the suit of the North Carolina interests, appellants here. The decree of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I certify that I am of Counsel for the railroads who are appellees in Nos. 560, 561, 574, and 592, and have this day served the foregoing brief, and the appendices thereto, by depositing copies of the same in the United States mail, properly stamped with first-class postage and properly addressed to the following:

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This day of April, 1945.

CHARLES CLARK.